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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

JOHN GILBERT, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 APC NATCHIQ, INC., )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Case No. 3:03-CV-00174-RRB

**DEPOSITION OF MARK C. NELSON**  
**June 15, 2006**

**APPEARANCES:**

**METRO COURT REPORTING**  
745 West Fourth Avenue, Suite 425  
Anchorage, Alaska 99501  
(907) 276-3876

1           **FOR THE PLAINTIFF:**           **MR. KENNETH L. COVELL**  
2   Attorney at Law  
3   Law Offices of  
4   Kenneth L. Covell  
5   712 West 8th Avenue  
6   Fairbanks, Alaska 99701  
7   (907) 452-4377

8           **FOR THE DEFENDANT:**       **MS. PATRICIA ZOBEL**  
9   DeLisio Moran Geraghty  
10    & Zobel, P.C.  
11    Attorneys at Law  
12    943 West 6th Avenue  
13    Anchorage, Alaska 99501  
14    (907) 279-9574

15           **ALSO PRESENT:**           **MR. DOUGLAS SMITH**

16    \* \* \* \*

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PURSUANT TO NOTICE, the Deposition of MARK C. NELSON was taken on behalf of the Plaintiff before Cheri Tabor, Notary Public in and for the State of Alaska and Reporter for Metro Court Reporting at the law offices of DeLisio Moran Geraghty & Zobel, P.C., 943 West 6th Avenue, Anchorage, Alaska 99501, on the 15th day of June 2006, commencing at the hour of 10:30 a.m.

\* \* \* \*

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1

P R O C E E D I N G S

2

(On record)

3

COURT REPORTER: My name is Cheri Tabor and I'm  
a court reporter for Metro Court Reporting in Anchorage,  
Alaska. Today's date is June 15, 2006, and the time is  
approximately 10:30 a.m. We are at the offices of DeLisio  
Moran Geraghty & Zobel, P.C., 943 West 6th Avenue, Anchorage,  
Alaska 99501 for the deposition of Mark Nelson. This case is  
in the United States District Court for the District of Alaska,  
in the matter of Gilbert v. APC, Case No. 3:03-CV-00174 RRB.

11

Mr. Nelson, please raise your right hand so I can swear  
you in.

13

(Oath administered)

14

MR. NELSON: I do.

15

MARK C. NELSON

16

having first been duly sworn under Oath, testified as follows  
on examination:

18

COURT REPORTER: Thank you. Please state your  
full name and spell your last name for the record.

20

A Mark Christian Nelson, N-e-l-s-o-n.

21

COURT REPORTER: And I need a mailing address  
for you.

23

A 3900 C Street, Suite 301, Anchorage, 99503.

24

COURT REPORTER: I also need a daytime or  
message telephone number.

25

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A 441-8071.

2 COURT REPORTER: Thank you. Counsel would you  
please identify yourselves for the record?

4 MR. COVELL: Kenneth Covell for plaintiff  
Gilbert.

6 MS. ZOBEL: Patricia Zobel for APC defendant.

7 COURT REPORTER: Thank you. You may proceed.

8 MR. COVELL: Thank you.

9 **DIRECT EXAMINATION**

~~BY~~ MR. COVELL:

Q1 Mr. Nelson, you were deposed a few years ago on a case  
12 called Zuber v. APC, right?

A3 Correct.

Q4 And in preparation for today's deposition, did you have  
15 an opportunity to review that prior deposition?

A6 The only prior I've done, is five minutes ago I reread  
17 the letter from the State -- and I just did that.

Q8 Okay. I don't intend to go into depth in your prior  
19 deposition, but do you have any reason, even if you  
20 haven't reviewed your prior deposition to think your  
21 answers would be different today than they would be  
22 from back then, at least in general?

A3 They should -- they should be identical.

Q4 Okay. And what you just reviewed, was this WHOL-122,  
25 is that the letter you reviewed, the letter from Randy  
Carr to you?

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A Is that the -- yes.

Q Okay. Since 2003, I guess what I'm trying to get at is  
3 briefly where you are in the organization since last we  
4 spoke. What I understood when we last spoke was you  
5 were president of APC Natchiq, is that right or wrong  
6 or close?

A Correct.

Q All right. And that was 26 of August 2003, does that  
9 sound about right?

A0 It's right. Correct.

Q1 Right around August 26th? Okay. So, since then where  
12 have you been job wise or organizationally with APC?  
13 And I understand that there's AES Energy Services and  
14 that's all somewhat unclear to me, but if you could try  
15 to briefly run us through your position, let's say  
16 relative to your old position -- organizationally?

A7 2004, I moved to -- from the presidency of APC to --  
18 the company name was changed to ASRC Energy Services  
19 Operations and Maintenance. Sometime in the period  
20 after that deposition, until the time I left, we  
21 changed the company name. I moved to the parent  
22 company, ASRC Energy.

Q3 Okay.

A4 Headed up the business development group for the parent  
25 company for about a year. And in the -- December of  
this year, moved over at -- a different job offer.

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1 Moved over as a COO of a construction holding company.

Q Which.....

A I'm no longer employed by ASRC Energy Services.

Q Okay. So you went to this construction holding  
5 company, sometime in the last year or so, I think.

A In the last six months.

Q Okay. And so you're out of ASRC entirely, at that  
8 point?

A Right. I'm out of ASRC Energy Services.

Q0 Is the company you're with now, an ASRC company?

A1 Yes.

Q2 And what's the name of that?

A3 ASRC Construction Holding Company.

Q4 Okay. So you were in the presidency through '04, and  
15 then you went into marketing and development, is that  
16 right?

A7 Correct.

Q8 And what did you market and develop, just briefly?

A9 Business of ASRC Energy Services.

Q0 Okay. So you still would have been president in April  
21 '03 when the positions of safety specialist and safety  
22 supervisor were reclassified from exempt to non- -- no,  
23 from non-exempt to exempt?

A4 Correct.

Q5 All right. And assuming Mr. Gilbert ended his  
employment about April '03, he would have been one of

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1 the employees under your direct command?

2 At that time I was president, if he was an employee of  
3 APC, he would have been in a -- in the direct line  
4 of --

5 Q Okay. And why don't we cover this question right now:

6 Do you know Mr. Gilbert vaguely or not at all?

7 A Only by name.

8 Q Okay. And is that because of the lawsuit or is that  
9 because at the time he was there, you had some exposure  
10 to him?

11 A Probably a combination of both.

12 Q Okay. But basically it's.....

13 A If he walked in here right now, I wouldn't know the  
14 guy.

15 Q All right. Basically, the familiarity is if you saw  
16 his name on a roster, you'd go, that's one of my guys  
17 or I think that's one of my guys?

18 A In the context of APC, sure.

19 Q In Zuber we discussed you examining the position of  
20 safety specialist and making a determination whether or  
21 not that position ought to be eligible for overtime or  
22 not eligible for overtime, right?

23 A Can you rep- --

24 Q Sure.

25 A In this previous deposition?

Q In the previous case, in Zuber -- correct me if I

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1 interchange the names here. In the Zuber case, we  
2 spent a lot of time talking with you about whether or  
3 not the safety specialist job was exempt or non-exempt.  
4 I don't -- I don't recall. The case -- we spent time  
5 around another position, a warehouseman, may -- we may  
6 have. I'd have to look back to the deposition. I  
7 don't know how much detail in the deposition we talked  
8 about safety specialist.

Q Okay. Well.....

A0 Well maybe we did, yes.

Q1 Okay. Let me represent to you that's reflected in your  
12 deposition.

A3 Okay.

Q4 That you spent a fair amount of time discussing  
15 conversations with Randy Carr, using some worksheets  
16 concerning questions of whether or not somebody ought  
17 to be exempt under the administrative professional or  
18 other exemptions. Is this refreshing your recollection  
19 at all?

A0 Yes, okay. Safety special.....

Q1 Right.

A2 Not a supervisor.

Q3 Right.

A4 Okay, yes.

Q5 Did you do any examination of the position of safety  
supervisor to determine whether or not it ought to be

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1 exempt for overtime or not?

2 MS. ZOBEL: You're speaking of 1998 or at any  
time?

4 MR. COVELL: Let's say ever, for the time being  
and then we can break it down by time.

6 A At the time, and I don't -- which year this was -- '97,  
7 '90- -- the same timeframe I spoke with the State  
8 representative which was Carr, Randy Carr.

9 Q Right.

10 A I -- I went through all position on the North Slope.

11 Q Okay. And so if Mr. Carr's letter is June 26, '97, it  
12 would be in that timeframe?

13 A Right.

14 Q Okay. And you've got a copy of that there with you,  
15 right?

16 A Right.

17 Q Okay. And that's alternatively referred to on the face  
18 of it, in the right-hand corner as WHOL-122, right?

19 A Correct.

20 MR. COVELL: Why don't we get this marked  
number one, here please, madam clerk.

22 COURT REPORTER: Exhibit N-1 marked.

23 (Deposition Exhibit N-1 marked)

24 MR. COVELL: And then just for the record we  
should probably make these Z's in front of the APC's, would you  
agree with that?

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1 MS. ZOBEL: G. Why would you do Z?

2 MR. COVELL: Why don't we go off record for  
3 just a second.

4 (Off record)

5 (On record)

6 MR. COVELL: And for purposes of clarity here,  
7 we've agreed that the N-1 will place a Z on each page in front  
8 of the APC numbers, because it's our belief that they came from  
9 the Zuber case originally, in order to avoid confusion with  
10 similarly numbered pages disclosed in Gilbert. All right. I  
11 can get back on my train of thought here.

12 (By Mr. Covell) And in looking at the last two pages  
13 then of N-1, that's that Randy Carr letter of June 26,  
14 '97 to yourself, and it's alternatively designated near  
15 the upper right-hand corner as WHOL-122, is that right?  
16 Correct.

17 MS. ZOBEL: Could I ask what the WHOL is?

18 MR. COVELL: It's wage and hour opinion letter.

19 MS. ZOBEL: Of course, it is. All right. I  
20 was thinking you had put it on there.....

21 MR. COVELL: No.

22 MS. ZOBEL: .....in the prior deposition.

23 MR. COVELL: Okay.

24 MS. ZOBEL: Too many numbers in this thing.

25 MR. COVELL: And acronyms, too.

MS. ZOBEL: Yes.

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Q (By Mr. Covell) So, you said, going back -- testing my  
memory here, you said at the time contemporaneous to  
that, you did a review of all positions in APC?

A Correct.

Q Okay. And one of those --

A It's one of the positions.

Q I apologize, Mr. Nelson, sometimes the questions we ask  
sound stupid, but for clarity of the record we have to  
ask the redundant questions.

MS. ZOBEL: And I think I need to clarify the  
record here with the regard to the safety supervisor position,  
because I think that they were different at the time that Mark  
was doing this in '97 and '98 and I think that comes from the  
testimony of Doug Smith, because when he came in it was a  
different -- he created that position. It was different from  
what had been held by Mr. Cannon or Gary Buchanan, I think.  
Not Gary Buchanan, but other people who had held that. And you  
can query him about that, but that's my understanding and I  
don't want the record to be messed up because we're talking  
apples and oranges.

MR. COVELL: Well that's.....

MS. ZOBEL: See if that's his understanding.

MR. COVELL: All right.

Q (By Mr. Covell) So, around that time of Mr. Carr's  
letter, you did a review of the safety supervisor  
position to see whether or not he qualified for

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1 overtime or not? He said yes to that question.  
2 Subsequent question now, is tell me what you did in  
3 that regard? In other words tell me how you conducted  
4 your review.

A For a safety supervisor?

Q Uh-huh.

A I started with the position -- the employees in the  
8 position. In the year '96, '97, Bob Cannon was the  
9 supervisor, one of the supervisors, and basically  
10 talked with those employees or that person about the  
11 position. Although at the time, those positions were  
12 direct reports of mine, so I also had a pretty good  
13 background of what they were doing for me as a direct  
14 report. So the combination of those two things, I  
15 could draw a conclusion in that if I felt the -- there  
16 was further research I needed to do, then I would  
17 further research the position.

Q8 Okay. And did that come to pass or not?

A9 Well for.....

Q0 Did you do further research?

A1 The safety supervisors were a position that I needed  
22 further clarification around which was also part of my  
23 conversation, in general, with the Wage and Hour  
24 Division.

Q5 All right. So, you talked to Mr. Cannon? You had a  
conversation with the Wage and Hour Division and we

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1 should assume that conversation or conversations was  
2 with Mr. Carr or not?

3 I know I had at least one conversation with Mr. Carr.  
4 You're drawing on 10 years ago now.

5 Sure.

6 I -- I know I talked with him. I can almost remember  
7 some of it very vividly -- the details of the  
8 conversation with Mr. Cannon, but how many  
9 conversations with the State now, I don't recall.

10 Okay. But, it's my recollection, I've looked at your  
11 deposition more recently.....

12 Yes, you may be better -- answer the question.

13 I think you said you may have talked to Mr. Carr five  
14 or six times. Something in that nature would be --  
15 okay. But besides -- was there another actor besides  
16 Mr. Carr, that you recollect?

17 I don't recall.

18 Okay. So you talked to Cannon and you talked to Carr  
19 and then what conclusion, if any, did you reach about  
20 the exempt or non-exempt status of the safety super- --  
21 let me pull that question. Did you do anything else in  
22 considering whether or not the safety supervisor ought  
23 to be exempt or non-exempt?

24 If the file didn't reference a written document, and  
25 with the safety supervisors, I don't recall doing one.

I don't think there was a -- there's a stand

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1 checklist. I -- you've got a copy of it, that we used  
2 to do back then, or I had done a number of them at the  
3 time. I don't recall doing one for the safety  
4 supervisors.

Q Okay.

A I doubt that I did given my recollection of the  
7 position at this time.

Q And then you brought up the checklist and whatnot --  
9 papers. I'm not aware of any papers that relate to the  
10 safety supervisor analysis as opposed to there are some  
11 that you mentioned in regard to the safety specialist  
12 position.

A3 The second tier. Right, that's correct.

Q4 Okay. And so that -- me not having any comports was  
15 your recollection of what you did?

A6 Uh-huh (affirmative).

Q7 Okay. All right. What training or experience did you  
18 have at that time in human relation? I'm sorry, human  
19 resources or employee resources, personnel, whatever  
20 you want to call it that would qualify you to make an  
21 exempt, non-exempt determination?

A2 Well, I was competent to talk with the State, and read  
23 and understand the regs as best I could interpret. I  
24 think at the time I asked our Anchorage office for  
25 assistance for a second or third opinion and based upon  
my formal education, I came to some conclusions around

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1 all of the positions on the North Slope whether they  
2 were exempt or non-exempt.

Q Let me paraphrase here, just to try to move things  
4 along. If I'm suggesting incorrectly, straighten me  
5 out, but you read and write English, you've gone to  
6 school, you have a degree in accounting, you can  
7 analyze things as well as the next person on the street  
8 so to speak, or perhaps better because of your training  
9 and education of whatever field you're in, and that  
10 enables you to make that determination, is that  
11 essentially what you're telling me?

A2 Correct.

Q3 Okay. And then my question, at least in part, leans  
14 toward saying besides having the abilities that many  
15 might, do you have any specialized training, education  
16 or experience that would lend you an ability perhaps  
17 above somebody else with that and I don't mean to  
18 demean accounting, but to call it the generic  
19 education, training and experience as opposed to some  
20 nature of specialized training, experience or education  
21 in the area of human resources? Do you under that as a  
22 question?

A3 Is that a question?

Q4 That was the question.

A5 I'm not sure I know how to answer. Let me.....

Q All right. Do you have specialized training and

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1 experience in human resources?

A Outside of the work place, beyond conference -- I think

3 one of them lies with the State or some of those --

Q Okay. You've been in conference or seminar, but

5 generally not?

A Those are specialized trainings around wage and hour,

7 they last 3, 4 days -- put on by the State, that type

8 of thing. Beyond that, no.

Q Okay.

10 MR. COVELL: I'd like to take a brief pause

here madame reporter.

12 (Off record)

13 (Deposition Exhibit N-2 marked)

14 (On record)

15 MR. COVELL: Mr. Nelson, we marked for you

Exhibit N-3, is it?

17 COURT REPORTER: N-2.

Q8 (By Mr. Covell) N-2, which is your former deposition

19 and I directed your attention to pages 26, line 23

20 through page 28, line 20. You've had a chance to read

21 that off record?

A2 (No audible answer)

Q3 You need to answer audibly.

A4 Okay. I'm sorry. I didn't understand it was a

25 question -- yes.

Q All right. Thank you. Is what you're saying there in

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1 that passage about a review of the safety supervisor  
2 position, the same thing you're telling me today?

A Yes.

Q Okay.

5 (Off record comments)

Q And besides that review then you did at that time of  
7 the safety supervisor position for eligibility for  
8 overtime from that time until you left your job as  
9 president in 2004, were you involved in any other  
10 reviews of the safety supervisor position for  
11 eligibility of overtime?

A2 No.

Q3 Okay. Were you aware of any other reviews of the  
14 safety supervisor position for eligibility of overtime  
15 as opposed to being involved in? Again, it may sound  
16 like a stupid question, but just trying to keep it  
17 clear.

A8 Sounds like it. And if I understand it, I -- the  
19 answer is no.

Q0 All right. Thank you.

A1 You want this exhibit back?

22 MR. COVELL: Yes, we'll just stack them up  
right here in front is fine.

Q4 We've already given you number one. Why don't you turn  
25 your attention to N-1 there. In looking at N-1, the  
first document there is December 7, '96 memo from

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1       yourself to Anne Hippe. Is this something that either  
2       sparked, or was it the beginning of your review of the  
3       various positions at APC for overtime?

4       A       Around this time, sure.

5       Q       Okay. And then following that page is a memo from  
6       Christopher Boyle to various people talking about, I  
7       guess, day rate and reviewing positions for exempt,  
8       non-exempt status, is that right?

9       A       Correct.

10      Q       And is that something that -- let me represent to you  
11      in your last deposition even though your name's not on  
12      here, I don't believe it is, you represented that you  
13      saw that or would have seen it, does that comport with  
14      your recollection today?

15      A       Likely.

16      Q       Sure. Okay. You see there where it says, please  
17      provide me with the requested information by January  
18      15, 1997?

19      A       Yes.

20      Q       Okay. And that would be directed towards the exemption  
21      issue, right?

22      A       Yes.

23      Q       Okay. Did you provide information to Mr. Boyle that  
24      date or otherwise in regard to the exempt, non-exempt  
25      status of positions with APC?

A       I don't recall.

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Q Okay. And again, if you did, at least as far as the  
safety supervisor goes, you would expect that there  
would be any writings in that regard?

A I don't re- -- I don't recall.

Q Okay. That's fine. To your recollection are there any  
writings -- withdraw that. I think you said you  
reviewed every position at APC for exempt, non-exempt  
status, is that a fair characterization or unfair?

A Fair.

Q Okay. And approximately how many positions would that  
be? What's the range in numbers there?

A I wasn't reviewing non-exempt positions. I was focused  
on exempt only because as a non-exempt position,  
there's not a liability.

Q Right. Okay.

A For employers, anyway. I looked at the exempt  
positions. We could have had a few dozen exempt  
positions at the time.

Q Okay.

A I'm guess- -- guesstimating.

Q Okay. And then you reviewed all of those?

A Some would have been fast -- certainly my own position,  
quickly come to a conclusion around, versus others  
which I would have had triggers that would require  
further investigation.

Q Right. As to any of those positions do you know if

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1       there are any writings concerning the analysis for  
2       classification of the positions?

A       I think there were at the time, 10 years ago.

Q       Okay.

A       I don't know if I addressed that in my earlier  
6       deposition. My memory today is far -- is more fuzzy  
7       about what I wrote or didn't write 10 years ago.

Q       We do know that we have this WHOL-122, right, in regard  
9       to --

A       Yes.

Q       Okay. Beyond that, and, again, I realize this is  
12       redundant, but to be clear for the record, do you know  
13       if there are any other writings that would commemorate  
14       in any form a review for exemption or non-exemption?

A       And when you say writing, you mean from a determination  
16       letter like the one you're referencing WHOL or --

Q       From it being a formal WHOL down to --

A       There was a file at the time that I maintained that was  
19       fairly extensive of notes, of checklists. There was a  
20       checklist we used to use of these kinds of memos. Any  
21       information I could gather around the exempt, non-  
22       exempt issue to help further my education that I  
23       maintained.

Q       Okay. And can you recollect, and I realize it's 10  
25       years, but just asking you for the record.....

A       It's okay.

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Q Can you recollect what positions those notes might  
2 apply to?

A I -- I really can't.

Q All right. And would you expect those notes to be in  
5 existence as of -- I'll make this a two-part question  
6 but I'll give it to you one part at time: As of today?

A They could be in some conex somewhere buried. Are they  
8 accessible? I've moved offices many times and all  
9 that. I -- I don't know if I could ever.....

Q Would you expect that they would have been accessible  
11 as of 2003?

A I think when the prior deposition was given, Ken, I  
13 tried to find as much infor- -- as I could.

Q Okay.

A And if it didn't surface then, it isn't going to  
16 surface now.

Q Okay. So as of your prior deposition, if it was  
18 something you could have come across you would have got  
19 it for us?

A I would have pulled it out.

Q All right. Very good. Again, in the hopes of saving  
22 some time here, in the previous deposition I pointed  
23 out a number of passages within these documents that  
24 talk about the complications and the difficulties in  
25 making the wage and hour exemption determination, you  
acknowledged that those were in there. Would you agree

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1 that making these types of determinations can be  
2 difficult and complicated?

3 A Sure.

4 Q All right. In any of these reviews that you did, did  
5 you ever do some type of time analysis to consider the  
6 issue of whether or not an employee was spending 20  
7 percent of his or her time doing what might be called  
8 rank and file or worker type of duties?

9 A Yes.

10 Q Okay. And how did you do that?

11 A Either through interview of the position, the employee,  
12 or if I had my own knowledge of being on the project  
13 sites, through a combination of those.

14 Q Okay. And, again, this will sound redundant, are there  
15 any written records commemorating those analysis?

16 A That haven't already surfaced? No.

17 Q Okay. Do you know if you ever submitted any of that  
18 information to Randy Carr either orally or in writing  
19 or somehow?

20 MS. ZOBEL: Other than what's in this stack?

21 MR. COVELL: Right.

22 A I sus- -- what I had told you a few years ago in my  
23 previous deposition would have been all I had. There  
24 was -- whatever I mentioned then, and my recollection  
25 was better two or three years ago than it is today.

Q Sure. I understand and appreciate that. I guess that

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1        springs on this question: Had there been a detailed  
2        commemoration somehow, like you said in writing done  
3        then, it would be a whole lot easier for us today to  
4        ascertain what you did or didn't do then, right?

5        Yes.

6        So is it your testimony, then, that your review of  
7        those 24 positions or whatever it was we talked about  
8        for exempt, non-exempt at the time contemporaneous to  
9        these memoranda would have fulfilled Mr. Boyle's  
10       request for somebody to be providing him with  
11       information concerning exemption, non-exemption by  
12       January 15. And let me just make a note here, I don't  
13       necessarily know that it happened by then, there's  
14       subsequent memos and I'm not sticking on that date as  
15       to whether or not it was done by that date, but  
16       sometime say within that year? And you want me to ask  
17       that again, and be more clear?

18                MS. ZOBEL: I have no clue what you're asking.

19                MR. COVELL: Okay.

20        I think I actually understand the question.

21                MS. ZOBEL: If Mark understands it, go ahead.

22        Let me make the comment, I -- you saw it and you  
23        pointed it out in one of the first memos. I wrote, you  
24        know, interoffice memo to the controller, the CFO, at  
25        the time and basically said I have questions and  
concerns about the exempt issue that's in the field

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1           today. Shortly, thereafter, you'll see Chris Boyle's  
2           e-mail back out to the field, I'm not copied on it,  
3           he's asking three weeks later in copying those same  
4           people that I wrote to, the CFO and the controller.

Q           (By Mr. Covell) I appreciate the information, but let  
6           me just stop you to be clear.

A           Yes.

Q           So when you're talking about your initial memo you're  
9           talking about December 7?

A           Right.

Q           The first page of it?

A           Right.

Q           And then you're calling this second page of it, Chris  
14          Boyle, December 26, his e-mail, right?

A           Correct.

Q           Okay. Go ahead please.

17                   MS. ZOBEL: Actually, it's not an e-mail, I  
18          think it's a memo.

A           This is the assumption 10 years ago, but I'm going to  
20          -- the world as it was then, I'm thinking -- I'm quite  
21          certain that Chris Boyle probably reacted in a positive  
22          to my memo that was probably passed on to him. He was  
23          not a direct report of mine, but I'm sure it was passed  
24          over and he's saying okay, let's check other sites out  
25          there because of these other company heads, the

Fredricksons, the Gabrielsons, the Laasches, the

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1 Cehulas, these are other people out there. I'm not  
2 copied. So he's saying, look, I'm going to get -- Mark  
3 is doing the analysis for the work that he's oversight  
4 -- let's, in turn -- let's look at the rest of pie out  
5 there.

Q (By Mr. Covell) Okay. And if you'd turn.....

A Now.....

Q Go ahead.

A Oh, okay. And the -- you -- part of your question, the  
10 January 15th, I was probably well underway. I don't  
11 know that my memo with Mr. Carr are those dates -- but,  
12 I was probably well underway of doing some type of  
13 analysis already.

Q4 Sure. Let's turn a few pages back to what's labeled --  
15 and it should be inked in ZAPC0180, and it's to you  
16 from Boyle April 4, '97?

A7 Yes.

Q8 And would this document then be subsequent  
19 communication in regard to, at least in part, the  
20 exemption, non-exemption issue we've been discussing?

A1 Yes, as his first paragraph: In follow-up to your  
22 questions of appropriateness -- sure.

Q3 All right. And let's turn to the next page 181 there,  
24 you see, he's still making the recommendation at  
25 parenthesis one there: Review all occupations where

there may be questions concerning classification of

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1 exempt, non-exempt foremen and other personnel, et  
2 cetera, right?

3 A Yes. You want confirmation that you just read that?  
4 Sure.

5 Q I want confirmation that Mr. Boyle's memo to you is  
6 recommending that all occupations where there may be  
7 questions concerning they are properly classified, be  
8 reviewed. That's the direction there, right or wrong?

9 A Yes.

10 Q All right. And then subsequent to that starting with  
11 201 through the end of it, appear to be documents -- or  
12 is it fair to say that they're documents pertain to  
13 your communications with Mr. Carr generally concerning  
14 the material supervisor job?

15 A Correct.

16 Q Okay. And again, you haven't had a chance to read --  
17 well you read this WHOL letter prior to the deposition,  
18 right?

19 A Correct.

20 Q And in there, in that WHOL letter, there's a discussion  
21 about paying supervisors whether exempt or not for  
22 every hour worked. And if you want to take time and  
23 review this that's.....

24 A I think that's -- yes, I think that's correct.

25 Q Okay. Did APC ever pay any supervisory person monies  
pursuant to this determination that they're eligible

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1 for pay for all hours worked?

A Did we ever pay any supervisor --

Q Let me back up here. What I take this to mean is that  
4 if the supervisor works, let's say, supposed to work 12  
5 hours and you get a certain amount of money for 12  
6 hours. If he works 13 hours he should get 1 hour of  
7 straight time, do you take it to mean that or do you  
8 take it mean something different?

A If we classify them in this supervisory classification.  
Q Okay. So, it would mean that he worked hours, he'd get  
11 one hour of straight time, but no premium pay for  
12 overtime?

A You could classi- -- right, that's -- I think that's  
14 what his determination letter says, right?

Q So, then, my question to you is: Did APC ever pay  
16 anybody from that classification in that manner? In  
17 other words, if a guy worked 13, did he get his extra  
18 hour of straight time?

A Beyond our 12-hour day, you mean?

Q Right.

A I don't recall.

Q Okay. And, again, it may sound redundant, follow-up  
23 question: Are there any records that you're aware of  
24 that would demonstrate that that did happen?

A That I don't recall.

Q Okay. Did you or APC ever address any employees in

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1 that classification and tell them that they were  
2 entitled to get straight time pay for every hour  
3 worked? In other words for that 13th or subsequent  
4 hour?

A I don't recall. I know it was one of our  
6 classifications and it was out there. Do I -- I don't  
7 remember a specific conversation with the supervisor.  
8 That would have probably been a tier below me.

Q Okay.

A0 At the time.

Q1 All right. Well, for instance, when his letter came  
12 out it might be, but I don't know this because I wasn't  
13 there, that somebody goes to the individuals in his job  
14 and says we need to pay you for every hour worked. So,  
15 subsequent to today or prior to today, whatever, we'll  
16 pay you for your time over 12 hours at the straight  
17 time rate?

A8 It could have easily happened, if this was an issue for  
19 me at the time, I communicated well to my direct  
20 reports. I think all of my direct reports at the time  
21 were classified as exempt which I was comfortable with.

22 They, in turn, could have gone through their next tier  
23 where they would have had supervisors under them and  
24 could have communicated this, yes.

Q5 Okay. But.....

A I am not aware of it.

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Q All right. So you're not aware that anybody paid anybody any money for all hours worked pursuant to this information coming to your attention?

A I think it's happened, but I don't recall, like you said, was it Jonny Jones, I don't remember.

Q Well let's speak more generally, than Jonny Jones. To the extent that you think it's happened, you know, who, what, when, where, why, how? What are the circumstances of it?

A And then I don't recall. I really don't.

Q All right. And again, it may sound redundant, are you aware of any records to that effect?

A No.

Q All right.

MR. COVELL: Let's go off record madame clerk.

(Off record)

(On record)

Q (By Mr. Covell) As far as you know Mr. Nelson, did anybody talk to John Gilbert about what he did on a day to day basis as safety supervisor?

A I don't know. I wasn't -- he was after my time.

Q Okay. But he was there, I represent to you he was there '01, '03, so you would have been way up at the top at the food chain and he would have been somewhere close to the bottom, right?

A Correct.

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Q Okay. And that comports with your prior answers that  
2 you know his name?

A (No audible answer)

Q Okay. Do you recollect that back in 2003 we could find  
5 a job description for safety supervisor?

A It's.....

Q Let me represent to you that I had thought it was in  
8 your deposition, that we discussed that and I was told  
9 there was none. I looked this morning and didn't see  
10 it in your deposition so it may be Mr. Boyle's  
11 deposition. And I recognize you're telling me memories  
12 have faded, but do you recollect having a safety  
13 supervisor position description ever, I guess?

A4 Oh, I'm sure at the time I was doing -- we put together  
15 job descriptions for virtually all positions on the  
16 Slope so at the time, mid- to late-90's there would  
17 have been one.

Q8 Okay. Would you expect that in 2003, that we would  
19 have been able to obtain a copy of one either for the  
20 Zuber or Gilbert litigation?

A1 Of a supervisor or --

Q2 Right.

A3 There's probably one somewhere. I don't know where  
24 today.

Q5 All right. Let me give you a couple of exhibits here.

We need to get this marked. You can start reviewing

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1 the former Gilbert 2.

2 COURT REPORTER: This will be N-3.

3 (Deposition Exhibit N-3 marked)

4 MR. COVELL: Here's one for you to keep.

5 COURT REPORTER: And I have two, and I'm going  
6 to put a Z on here?

7 MS. ZOBEL: No.

8 COURT REPORTER: All right. No Z.

9 MR. COVELL: See, we agreed on something. And  
10 ahead and mark this one as well please.

11 COURT REPORTER: N-4 is marked.

12 (Deposition Exhibit N-4 marked)

13 (By Mr. Covell) And if you look at N-3 and N-4,  
14 particularly the third page -- have you had a chance to  
15 review that?

16 You want me to read this?

17 Well if you look at N-4, it's APC1793, do you agree or  
18 disagree with that describing, I guess, under the  
19 heading essential functions of the safety supervisor.  
20 Does that appear to be accurate or inaccurate or --

21 Yes, it looks good.

22 All right. And then I draw your attention under job  
23 description, there's a box here checked AES Operations  
24 and Maintenance and also down here there's an effective  
25 date 01/01/04. Given those indicators is it possible  
for you to determine when this might have been

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1 generated, this particular document?

2 I'd assume it was -- I assume it was generated around  
3 the -- the effective date. This document was around  
4 January of '04.

5 Okay. And when did AES Operations and Maintenance,  
6 Inc. come into being, if you can tell us?

7 I don't recall the exact date, it was either 2003,  
8 2004, when we -- when we changed the names legally over  
9 to --

10 Okay.

11 Your question's around -- from APC to AES, I presume?

12 Right. Something in that timeframe?

13 Somewhere in that timeframe.

14 Very good. All right.

15 MR. COVELL: Let me get this one marked here  
16 please.

17 COURT REPORTER: This will be Exhibit N-5. Is  
18 it going to have a Z in front of it?

19 MS. ZOBEL: No.

20 MR. COVELL: No.

21 (Deposition Exhibit N-5 marked)

22 (By Mr. Covell) And since N-5's an organizational  
23 chart of what would appear to be the safety department,  
24 is it correct that you're aware that around April 2003,  
25 the safety supervisor position was either renamed or  
reclassified?

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A Correct.

Q Okay. And that became -- well what title was given to  
3 the position that used to be safety supervisor, if you  
4 know?

A Beyond this org I'd say -- you mean beyond the safety  
6 supervisor here, or I'm not sure I --

Q Let me back up.

A Okay.

Q My recollection from Mr. Smith's deposition is that  
10 around April 2003, your company eliminated the safety  
11 supervisor job and created a job that had similar  
12 functions and would have fit in this organizational  
13 chart at the safety supervisor level, does that comport  
14 with your knowledge?

A5 Okay. And, you know, that -- those details now are  
16 getting -- or would have been handled more so between  
17 the business unit manger and -- and his direct reports,  
18 who would have been Doug Smith at the time.

Q9 All right. So, I can take that as an I don't know  
20 answer then, correct?

A1 Yes.

Q2 Is that fair?

A3 Probably.

Q4 All right. Well let me cut to the quick here: Do you  
25 know what different duties a -- whatever successor  
position there may have been, would have had from a

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1 safety supervisor? In other words, one day you've got  
2 the safety supervisor in there, he has certain duties.

3 The next day, a week, a month later, six months later  
4 -- whenever it is, the safety supervisor position is  
5 gone. There's a new position there, and they have  
6 duties --

7 Then, from when I did my analysis, six years prior to  
8 this or whatever timeframe?

9 Q I'm sorry, I didn't understand the answer.

10 A Okay. Well it was really a question.

11 Q Okay.

12 A You're asking -- I think the distinction you're making  
13 -- correct me if I'm wrong, the safety supervisor as it  
14 is here in whatever year this was, 2003 versus my  
15 analysis of a safety supervisor in the year 1997, or  
16 whatever.

17 Q No, no -- in around April of 2003, when the job got  
18 changed from safety supervisor to some other  
19 designation, which may be -- does the phrase safety  
20 coordinator ring any bells with you?

21 A No, but are we talking about this one? The one that  
22 says safety supervisor here?

23 Q Right. We're talking about that block on the  
24 organization chart.

25 A Okay. Okay.

Q I've been told that that job no longer exists.

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A Today.

Q Today and as of April '03.

A Okay.

Q You don't know?

A I don't know.

Q All right. Now, this will sound redundant, and I think I know what the answer's going to be, but just to be clear: Do you know what the difference between the two jobs would have been as far as duties were?

A0 No.

Q1 And, again, recognizing that you barely know Mr. Gilbert, do you have any reason -- withdraw that. Do you know if APC has any records to dispute Mr. Gilbert's claim that he worked varying hours while employed both as a safety specialist and safety supervisor, which, for example, he recorded in the ranges of 12, 13, 14, 15 hours a day?

A8 Would there be -- am I aware of his records, or am I aware of --

Q0 Mr. Gilbert claims he worked varying hours while he was employed, from 12 hours on up, sometimes towards 20. But, generally, 12, 13, 14, 15 hours. My two-part question, question number one is: Are you aware of any records that would dispute his assertion that he worked those hours?

A I would have to answer it this way, is if he claimed to

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1 -- I'm not -- I've never seen his claim so I don't know  
2 what it is. If, he were, because of my familiarity  
3 with the work -- if he were to claim I worked 15 hours  
4 in the field and there were field records to document  
5 that claimed something else, it could be anywhere from  
6 flight logs to billeting or camp records that he could  
7 check -- I mean, there are lots of different records  
8 available that could contradict his claim, certainly  
9 could be out there. I'm not aware of those, nor have I  
10 seen any research or --

Q11 All right. And, again, to be clear for the record, you  
12 don't have any personal knowledge that would dispute  
13 Mr. Gilbert's that he worked a certain number of hours  
14 any day?

A15 No.

Q16 Okay. I represent to you in reviewing your last  
17 deposition, you said that you had legal counsel in-  
18 house at APC since about 2000, does that seem to be  
19 correct?

A20 Yes, at least from then. I don't remember -- I'm  
21 trying to remember when the -- we've always had some  
22 counsel at the parent company, but I -- let's say yes.

Q23 All right. So, if somebody had wanted to consult with  
24 in-house counsel concerning an exempt, non-exempt issue  
25 that resource of legal counsel would have been  
available to them?

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A A supervisor, manager position, sure.

Q Which yourself and Mr. Boyle would fit --

A Absolutely. Uh-huh (affirmative).

Q Did a safety supervisor do intermittent work or  
5 substitute on a regular basis for the duties performed  
6 by a safety specialist?

A Repeat the question.

Q Okay. Let me sort of frame it up for you. I'm not  
9 trying to trick you here.

A0 That's all right.

Q1 I hope I'm not. Okay. Safety specialist has certain  
12 duties, right?

A3 Correct.

Q4 Okay. Safety supervisor has certain duties, some of  
15 which the company maintains are different than safety  
16 specialist, right?

A7 Correct.

Q8 Okay. Did the safety supervisor do work on an  
19 intermittent or substitute basis that the safety  
20 specialist did? You want me to give you an example?

A1 Yes.

Q2 Okay. For instance, the safety supervisor might be in  
23 the office doing whatever they do, might they be called  
24 out to the field to do a job, or a piece of work that a  
25 safety specialist would normally do?

A It could certainly happen, sure.

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Q And when it happened would that be fair to call that  
happening on an intermittent or substitute basis?

A I -- I would think it would be -- it would not be  
frequently.

Q Okay. But, here's what I think I've heard over the  
years in both these cases. Safety supervisor might be  
back at the office doing whatever they do, and the  
safety specialist sort of had areas to work on right?  
They might have a pad or a section of the oil field?  
A Okay.

Q And the safety specialist who was sort of assigned  
there may be tied up in another job and the client's  
calling and saying we want, I don't know, confined  
space entry permit or we need some safety service in  
another portion of our area now, would a safety  
supervisor go out and cover that work?

A I would suspect, sure. The client might call a  
supervisor and say, look the specialist is tied up,  
could you come out and give us an opinion, could you  
give us -- could you take a second look, could you  
advise us on this, that type of thing. It certainly --  
could it happen? Absolutely. With the special- --  
would the supervisor respond, I don't know why they  
wouldn't.

Q Okay. All right. And, just trying to be clear, the  
question is: To your knowledge did the safety

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1 supervisors do safety specialist work from time to  
2 time?

A Not that I'm aware of in -- not that I'm aware of.

Q Okay.

A Because it crosses over. There's a certain cross over,  
6 so --

Q Okay. The certain crossover being that the safety  
8 supervisor does a lot of the same tasks as the safety  
9 specialist, is that --

A10 Well the safety specialist is a person who's out there  
11 with the ears and eyes and interpreter and -- and is  
12 certainly some one in enforcement. A lot of dif- -- a  
13 lot of different roles that the specialist plays, so  
14 the supervisor certainly should no all of those roles,  
15 and -- and also then have a -- maybe even higher level  
16 of background to be able to assist or to offer a second  
17 opinion or to interpret the policy or to write --  
18 whatever it may be out there. But I don't know -- I  
19 don't recall -- I think you're asking, and I don't  
20 recall whether the safety supervisor went out and did  
21 -- covered an area for a week, let's say, for the  
22 specialist or something like that or two days or three  
23 days. I don't think that type of thing happened.

Q24 All right. But for an.....

A25 Frequently.

Q .....afternoon or something they might?

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A Possibly.

Q Okay. Well I mean, for instance, looking at this N --  
3 I didn't write it on here.

4 (Off record comments)

A Three.

6 MS. ZOBEL: Three.

A Four.

8 MR. COVELL: And four.

Q (By Mr. Covell) And you looked at this page, 1793 and  
10 you go down and look at number 3, it says inspects or  
11 tours organization facilities to detect existing or  
12 potential accident and health hazards, recommends  
13 corrective or preventative actions. That's a duty of  
14 the safety supervisor, right?

A5 Correct.

Q6 Okay. That would also be a duty of the safety  
17 specialist, right?

A8 Absolutely.

Q9 All right. And so the safety supervisor would do any  
20 of these types of things on 1 through 10, on a daily  
21 basis, is that correct?

A2 The safety supervisor as well as the safety specialist  
23 should be doing these 24 hours a day.

Q4 Okay.

A5 That's their role.

Q That's their job?

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A Right. They're trained in this, right.

Q Okay. Again, in regard to your prior deposition, I  
3 asked you some questions about some of the materials  
4 concerning determining exempt, non-exempt, and one of  
5 the materials said, one of the most expensive mistakes  
6 that can be made -- or misdetermining somebody from  
7 exempt to non-exempt is one of the most expensive  
8 mistakes that can be made when ascertaining the  
9 overtime status of people, would you agree that that's  
10 true?

A1 Correct.

12 MR. COVELL: Let's go off record.

13 (Off record)

14 (Deposition Exhibit N-6 marked)

15 (On record)

Q6 (By Mr. Covell) Mr. Nelson, I've handed you a series  
17 of documents labeled N-6 and there seems to be some  
18 indication that they're called JVA's or job vacancy  
19 announcements. Earlier I was asking you in relation  
20 and by this organization if you know what position may  
21 have filled the void that may have been created by the  
22 safety supervisor job. In looking at these names here,  
23 HSET Coordinator, HSE Advisor, Safety Specialist, is  
24 that -- I guess we may have advisor twice there, might  
25 that refresh your recollection as to what job title  
might have replaced that of safety supervisor?

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A I don't know, I wasn't involved with this.

Q This would appear to be after your time, being 2006,  
3 right?

A Yes, that's way after my time.

Q All right. Drawing your attention, conceptually,  
6 anyway back to wage and hour letter 122, would it be  
7 fair to say that that particular document would protect  
8 APC from having to pay overtime? I'll rephrase that if  
9 you like.

A10 For a supervisor's position?

Q11 Right.

A12 That was my understanding at the time.

Q13 Okay. And do you have any reason -- and has that  
14 understanding changed?

A15 No.

16 MR. COVELL: All right. That's all I have.

17 MS. ZOBEL: I have no questions.

18 (Off record)

19

20

21 \* \* \* END OF PROCEEDINGS \* \* \*

22

23

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*Anchorage, Alaska 99501*

*(907) 276-3876*

S I G N A T U R E

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STATE OF ALASKA )

3 ) ss.

THIRD JUDICIAL DISTRICT )

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I, **MARK C. NELSON**, have read the foregoing deposition and have made corrections thereto. Any and all changes, explanations, deletions and/or additions to my testimony may be found on the correction sheet(s) enclosed with this transcript.

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\_\_\_\_\_  
**MARK C. NELSON**

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STATE OF ALASKA )

) ss.

THIRD JUDICIAL DISTRICT )

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THIS IS TO CERTIFY that on this \_\_\_\_\_ day of \_\_\_\_\_ 2006, before me appeared **MARK C. NELSON**, to me known and known to be the person named in and who executed the foregoing instrument, and acknowledge voluntarily signing and sealing the same.

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\_\_\_\_\_  
Notary Public in and for  
State of Alaska, at Anchorage  
My Commission Expires:\_\_\_\_\_

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1 THAT this Deposition, as heretofore annexed, is a true  
2 and correct transcription of the testimony of said Witness  
3 taken by Cheri Tabor and hereafter transcribed by her;

4

5 THAT the original of the Deposition transcript will be  
6 lodged in a sealed envelope with the attorney requesting  
7 transcription of same, as required by Civil Rule 30(f)(1)  
8 amended, that attorney being:

9 MR. KENNETH L. COVELL, Law Offices of Kenneth L.  
10 Covell, Attorney at Law, 712 West 8th Avenue,  
11 Fairbanks, Alaska 99701;

12 THAT I am not a relative, employee or attorney of any  
13 of the parties, nor am I financially interested in this action.

14

15 IN WITNESS WHEREOF, I have hereunto set my hand and  
16 affixed my seal this 29th day of June 2006.

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\_\_\_\_\_  
Jerri Young  
Notary Public in and for Alaska  
My Commission Expires: 11/03/07

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